

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 28, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0995

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JACQUIE HUR,

Plaintiff-Appellant.

v.

**MICHAEL R. GARVIN,
JUDITH A. GARVIN
and BANK ONE, JANESVILLE NA
F/K/A FIRST PEOPLES BANK
and MARINE FIRST NATIONAL BANK,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Rock County:
PATRICK J. RUDE, Judge. *Affirmed in part; reversed in part.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Jacquie Hur appeals from a judgment dismissing, for failure to prosecute, her action against Michael R. Garvin and Judith A.

Garvin, and granting the Garvins' counterclaims. We affirm dismissal of the action, but reverse the order granting the counterclaims.

Hur filed her complaint in July 1992 and an amended complaint in August 1992. She alleged the Garvins executed a promissory note to her in 1976, and executed and delivered their mortgage as collateral for the note in 1979. Hur alleged the Garvins were in default. She sought judgment of foreclosure, sale of the mortgaged premises and payment of the amount due on the note.

The Garvins counterclaimed. They alleged that when the note was executed, Hur and her husband, attorney and agent Ken Hur, were motor vehicle dealers or salespersons regulated by § 218.01, STATS., and subject to the Wisconsin Consumer Act, chs. 421 to 427, STATS. The Garvins alleged the original note and a mortgage note modification in 1981 violated those statutes, making the note and mortgage unenforceable. They sought money damages.

Hur moved for summary judgment in December 1992. The motion was denied orally in February 1993 and by order in March 1993. Hur's counsel moved to withdraw approximately seventeen months later in August 1994. The motion was granted and Ken Hur became the attorney of record. In a letter to the court dated September 12, 1994, Attorney Hur stated that former counsel "misunderstood my wife[']s intention and inadvertently let this matter drag believing it was capable of settlement. He was in error." Attorney Hur stated he met with the Garvins' attorney and rejected their settlement offer. He asked that the case be set for trial.

On September 23, 1994, the Garvins moved to dismiss for failure to prosecute. The motion was accompanied by their attorney's affidavit which stated they made a settlement offer "shortly after" the summary judgment motion was denied, in February 1993, but Hur did not respond until September 1994.

Now represented by another attorney, Hur filed an "opposition" to the dismissal motion in November 1994. The document did not account for the delay in the litigation, other than to say counsel "engaged in settlement

discussions" after the summary judgment motion was denied. It stated that Hur's activities showed continued prosecution of the matter, "in spite of apparent difficulties with former counsel and the like."

The court held a hearing on the motion in November 1994. The Garvins' attorney disputed there had been "settlement discussions," and stated there had only been his letter which went unanswered until September 1994. Hur's counsel was unable to explain the delay in prosecuting the case, but argued it was not so extreme as to warrant dismissal.

The court orally granted the motion, stating in part:

The court is of the opinion that the plaintiff ... has been derelict in pursuing its rights and remedies in this matter [T]he court finds that there was no proper prosecution of this matter

The previous attorney resigned. We know not the reason why from this record, but clearly there was a failure of the plaintiff to pursue their claim for an extended period of time.... [C]ertainly failure to prosecute a case of a year or more indicates to the court that the matters are not going to be pursued, and all it takes is -- in those cases is for the court to find some reason to not dismiss, and I'm very liberal in that, as I think the court should be.

This is not the case. There was no request, no reports, no nothing for an extended period of time, so your motion is granted....

The court's order entered on November 21, 1994, also granted judgment in the Garvins' favor on their counterclaim. The order declared void and invalidated Hur's mortgage.

Hur moved for reconsideration in December 1994. The factual basis for the motion was to be "elaborated in the Affidavits to be submitted to the Court prior to hearing on the Motion." Hur's counsel later filed an affidavit stating he requested an affidavit by Attorney Hur and received a letter in response, which counsel believed "fully states" the position of Jacquie Hur on the reconsideration motion.

At the hearing on the motion in February 1995, plaintiff Hur sought to present the testimony of Attorney Hur and her original attorney. The Garvins objected because there had been no notice that witnesses would be presented. The court declined to allow the testimony and confirmed its original order. Hur appeals.

The trial court may dismiss an action for failure to prosecute. Section 805.03, STATS. The court may make such orders as are just. *Id.* For a decision under this section to be sustained, there must be a reasonable basis for the trial court to determine that the party's conduct was egregious and there was no clear and justifiable excuse. *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 276-77, 470 N.W.2d 859, 865 (1991). The decision to dismiss is discretionary, and one which we will affirm if the court examined the relevant facts, applied a proper standard of law and reached a conclusion a reasonable judge could reach. *Johnson*, 162 Wis.2d at 273, 470 N.W.2d at 863.

Hur argues the court erred by not considering whether her conduct was egregious. However, an implicit finding of egregiousness is sufficient if the facts provide a reasonable basis for the court's conclusion. *Schneller v. St. Mary's Hosp.*, 162 Wis.2d 296, 311, 470 N.W.2d 873, 878-79 (1991). Such a finding was implied by the court's comments when granting the motion.

Hur argues the record does not support a finding of egregiousness. We disagree. A reasonable judge could conclude a delay of nearly nineteen months, combined with failure to respond to a settlement offer, is egregious conduct.

Hur argues the court erred by rejecting the testimony she offered at the reconsideration hearing. The trial court has discretion as to the nature of proof that may be presented, including whether to permit witnesses to testify. *Honeycrest Farms, Inc., v. A.O. Smith Corp.*, 169 Wis.2d 596, 604, 486 N.W.2d 539, 542 (Ct. App. 1992). Because Hur provided no notice that witnesses would be presented, and because Hur had previously stated information would be supplied before the hearing by affidavit, the court properly declined to allow the witnesses to testify.

Hur argues there was confusion about the scheduling of a pre-trial conference that was to occur after denial of the summary judgment motion. However, Hur could certainly have requested such a conference or inquired as to its status.

Hur argues the court should have considered the "mutual ongoing settlement efforts." The record contains no indication there were settlement efforts other than the Garvins' long-unanswered offer.

Hur argues the court should have considered "the apparent problems" between her and her original attorney. We disagree. "Ultimately, when an attorney's egregious failure to obey court orders implicates the court's ability to administer judicial business, it is more equitable to allow the adverse consequences to fall upon ... the party who has chosen the attorney, rather than on the adversary...." *Johnson*, 162 Wis.2d at 285, 470 N.W.2d at 868.

Hur argues dismissal of her case is not "just," as required by § 805.03, STATS. She argues the Garvins acquiesced in the delay and could have moved the case forward at any time. However, it is not the defendants' obligation to prosecute the plaintiff's case. She argues dismissal offends the public policy favoring trial on the merits. The "egregiousness" requirement functions to balance that policy against other important public policies such as judicial efficiency and timely resolution of disputes.

For these reasons, we conclude the court properly dismissed Hur's claims.

Hur also argues the court erred by granting judgment on the Garvins' counterclaim and voiding the mortgage. We agree. We are aware of no law which requires a court to grant judgment on a defendant's counterclaim when dismissing the plaintiff's complaint for failure to prosecute. We see no reason why that should occur here. The Garvins did not pursue their counterclaim any more than Hur pursued her complaint.¹

By the Court.—Judgment affirmed in part and reversed in part. Costs awarded to the respondents.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ We note the Garvins assert on appeal that the judgment voiding the mortgage had no additional impact on Hur and was a meaningless exercise. If true, it is not clear why the Garvins oppose reversal of that part of the judgment.